



"RE-BUILDING THE CITY'S WATER SYSTEMS FOR THE 21ST CENTURY"

Sewerage & Water Board OF NEW ORLEANS

C. RAY NAGIN, President
TOMMIE A. VASSEL, President Pro-Tem

625 ST. JOSEPH STREET
NEW ORLEANS, LA 70165 • 504-529-2837 OR 52W-ATER
www.swbnola.org

Mr. Mark Riley
Deputy Director Governor's Office of Homeland
Security and Emergency Preparedness (GOHSEP)
7667 Independence Blvd
Baton Rouge, LA 70806

Date: October 15, 2009 (revised 10/16/09)

Re: Sewerage & Water Board of New Orleans – Disaster# 1603 FIPS # 071-06A69-00
Arbitration Request of Project Worksheets 4165, 16335,4031,13231,and 18528

Dear Mr. Riley:

The Sewerage & Water Board of New Orleans (S&WB) respectfully request to withdraw any pending appeals associated with the following project worksheets. The Board intends to submit these project worksheets for resolution through the Arbitration process created by the American Recovery and Reinvestment Act of 2009

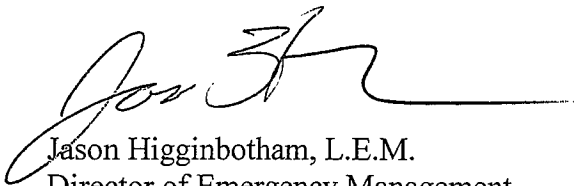
- PW#16335 EBWWTP Berm
- PW# 13231 and 18528 Generator for the EBWWTP
- PW# 4165 Anti Theft Devices
- PW#4031 Clarifiers

Once again please accept this correspondence as the Sewerage and Water Board of New Orleans' official request to have PW#4165, 16335,4031,13231,and 18528 administered through the American Recovery and Reinvestment Act of 2009 and any pending appeals associated with these projects withdrawn. The Board will be submitting its packages to the Clerk of the Board for the Civilian Board of Contracts Appeals on Monday October 19th Via Federal Express Overnight, while simultaneously submitting a copy of the package to Mr. Gary Jones FEMA region 6 and your office. The Board appreciates in advance the State of Louisiana's support of this arbitration process. If you have any questions or concerns regarding this correspondence, please contact me at (504) 218-3235.

Please Note the Board's contact for this arbitration process as follows.

Mr. Jason Higginbotham, LEM
625 St. Joseph Street
Room 117
New Orleans, La 70165
Office: 504 585 2015
Cell: 504-218-3235
Fax: 504-522-8721
Email: Jhigginbotham@swbno.org

Sincerely,



Jason Higginbotham, L.E.M.
Director of Emergency Management
& Applicant's Authorized Representative



RRR Division - Region VI

LOG# 09-10-092

Received 10/19/09

BY [Signature]

DE-LOG 1/1/

BY

Arbitration

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Clerk of the Board

Civilian Board of Contract Appeals (CBCA)
1800 F ST., NW, Washington, 20405
Sixth Floor, 1800 M St. NW
Washington, DC 20036

Date: October 15, 2009

Date Rec'd:	10/19/09
Rec'd by:	[Signature]
Director	Action
Deputy	Info
XA	
Analyst	
DAD	X
DOD	
MIT	
MGT	
NP	
File	X
Suspense	
Date:	11/19/09

09-10-5028

Re: Sewerage & Water Board of New Orleans – Disaster# 1603 FIPS # 071-06A69-00
Arbitration Request of Project Worksheets 16335.

Dear Arbitration Panel,

Please accept this correspondence as the Sewerage and Water Board of New Orleans' official request to have Pw#16335 administered through the American Recovery and Reinvestment Act of 2009.

Impact of Katrina and the failures of the Federal levees system on the S&WB

The Sewerage and Water Board of New Orleans has a long and significant history. It was created in 1896 by the State Legislature in response to a demand for elimination of open sewerage and poor drainage.

Prior to Hurricane Katrina the Board was financially sound and had a productive capital program that maintained our Water, Sewer and Drainage system. With a staff of 1,200 the Board was able to respond to the preventive maintenance requirements to maintain its massive system. Today, the Board has approximately only 900 employees. We were looking forward to continuing to provide reliable services to the citizens of New Orleans, however, on August 29, 2005, Hurricane Katrina impacted Southeast Louisiana and the Gulf Coast of Mississippi and Alabama.

The resulting breach and overtopping of the federal levee system flooded all but 20% of the City of New Orleans/Orleans Parish. The exception of Algiers (the Westbank portion of the City) and what has come to be known as the "Sliver by the River", roughly described as that area between St. Charles Avenue on the North, and the Mississippi River on the South, very roughly from the Carrollton Avenue/St. Charles Avenue intersection area in the west thru the Audubon Park area, Uptown, Lower Garden District, Warehouse District, Part of the CBD, the French Quarter, and part of Fauborg Marigny

Members of the Board: ALAN ARNOLD • JACQUELYN B. CLARKSON • BENJAMIN L. EDWARDS, SR. • ARNIE FIELKOW • KAREN HENLEY-RAYMOND
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in the east. The remaining approximately eighty percent (80%) of the City was flooded and uninhabitable.

The Westbank (Algiers) portion of the City never lost water pressure, and the Algiers Water Plant, at times, literally and figuratively, a beacon in the night, and at first the only operating water plant in the entire area, supplied water, via Water Tank Trucks, to all corners, including the military, FEMA, the hotels, and the cruise ships providing living accommodations to thousands of displaced City employees and their families.

The international technical community estimated that once the levees were sealed, it would take about 3 - 4 months to dewater (their term)/drain the City, about 6 months to restore the Drinking Water System, and about 1 year to restore the Wastewater (Sewerage) System.

The City was declared drained on September 19, 2005, about three (3) weeks after the storm - Not the predicted 3 - 4 months.

With regards to the Water System, water pressure for fire protection was restored on September 6, 2005, about one (1) week after the storm. Potable water was restored to the area between the 17th Street Canal and the Industrial Canal (from the River to the Lake) on October 5, 2005, or about five (5) weeks after the storm - not the predicted 6 months.

Potable water was restored to almost all of the area east of the Industrial Canal on December 8, 2005, or about fourteen (14) weeks after the storm - again, not the predicted six (6) months, or twenty-four (24) weeks.

Today the Sewerage and Water Board is still experiencing the impacts of Katrina, impacting the sewer, water and drainage Systems. Still today the Boards Water system has not been restored to it Pre-Katrina water production capacity due to high volumes of water leaks. Also numerous sewer stations continue to operate on portable pumps, half the capacity of the station. An underpass drainage station still has not been repaired. The above is due to the overall destruction of the Board system and the time it takes to design and construct new faculties. If that were not enough, the Board still finds itself working through the FEMA process to get version and scope alignment so that it can begin the bid and construction process to restore its systems.

Project History

Hurricane Katrina severely damaged the entire EBWWTP causing damages in excess of \$100,000,000. Thus far, FEMA (through the PW process) has addressed this devastation by writing 111 PWs totaling \$55,000,000. Additionally, the FEMA Project Officer (PO) and 406 Hazard Mitigation Specialists prepared a mitigation PW16335 and Benefit Cost Analysis (BCA) (**BATES STAMP 00016**)

for a proposal that would dry flood-proof the facility by raising the existing Berm surrounding the facility to eighteen feet (18') from its current height of 10.5 to 12 feet, protecting the facility from flood of record. Unfortunately, the PW was later deemed ineligible by FEMA's Mitigation Group even though the Project Officer, the Public Assistance Coordinator (PAC), the Utilities Group Lead and the 406 Mitigation Specialist assigned to the Utility Group endorsed the project, stating that:

"Future flood damages at this wastewater treatment plant can easily be prevented in a cost effective manner as demonstrated by the disaster-specific cost benefit analysis applied to the flood of record."

In contradiction however, on 10/17/2007 J. King, FEMA 406 Mitigation Lead wrote (see mitigation entry in PW mitigation section):

"Work described in this HMP proposal applies more to the relatively undamaged elements (i.e. the Berm) than the damaged elements of the WWTF. FEMA policy 9526.1 sections 7.A states that section 406 mitigating measures must be related to the eligible disaster related damages".

Case History

In contradiction, however, on 10/17/2007 J. King, FEMA 406 Mitigation Lead wrote (see mitigation entry in PW mitigation section): **(BATES STAMP 00023-16)**

"Work described in this HMP proposal applies more to the relatively undamaged elements (i.e. the Berm) than the damaged elements of the WWTF. FEMA policy 9526.1 sections 7.A states that section 406 mitigating measures must be related to the eligible disaster related damages".

The S&WB Appealed this decision **(BATES STAMP 00001)** contending that FEMA Policy (9526.1) Section 7(a) states: **(BATES STAMP 00039)**

"406 provides discretionary authority to fund mitigation measures in conjunction with the repair of the disaster-damaged facilities. These opportunities usually present themselves during the repair efforts. The mitigation measures must be related to eligible disaster-related damages and must directly reduce the potential of future, similar disaster damages to the eligible facility. This work is performed on the parts of the facility that were actually damaged by the disaster and the mitigation measure provides protection from subsequent events. Exceptions to this provision will be reviewed on a case-by-case basis."

The S&WB further contended that this policy imposes only the following conditions for 406 Mitigation funding:

- 1) **Must be related** to eligible disaster-related damages
- 2) **Must directly reduce** the potential of future, similar disaster damages to the eligible facility

The 406 Hazard Mitigation Proposal identified by FEMA's Utility Group and the S&WB for the EBWWTP clearly addresses both conditions. The increased of height of the Berm is globally related to all disaster damages sustained at this facility (system); and will directly reduce the potential of future flood related damages. The other alternative (attempting individual mitigation measures on a multitude of PWs) for possibly achieving the same results would be overly complex, costly and far less effective.

Unfortunately, FEMA denied our Appeal with a myriad of contentions supported with often-paraphrased sections of policy; concluding that:

"The berm has not been considered or determined to be an eligible facility, damaged as the result of the disaster, and the berm is not an integral part of the entire EBWWTF system. The hazard mitigation measures proposed in PW 16335 is scoped for work that does not mitigate a damaged element of the applicant's eligible facilities, and does not meet the minimum eligibility requirements to qualify for Section 406 Hazard Mitigation funding. Therefore, the appeal is denied."

We address these conclusions as follows:

Notwithstanding that FEMA has the ability to grant exceptions to the policy (as the appeal reviewers understand it to read); they also have an obligation to implement federal relief programs in a logical, reasonable and consistent manner.

The ruling that because the Berm did not sustain damages, it is not eligible for mitigation is not consistent with other funded mitigation activities throughout the Country. If, in fact, these types of projects are statutorily prohibited, as the appeal team indicates; then projects (as submitted in our first appeal) like the floodwalls in the Texas Medical Center and a protective berm at the Binghamton-Johnson City Joint Sewerage Board Wastewater Treatment Plant would not have been deemed eligible and subsequently funded through 406. **(BATES STAMP 00038)**

Additionally, the S&WB presented a FEMA mitigation guide (attached) recommending floodwalls as a method for dry flood-proofing facilities under the 406-mitigation program. We were alarmed to find that even in the face of these examples, FEMA simply responded with *not eligible*. Surely since these floodwalls and berms did not exist prior to the disaster, they could not have been a "damaged element". Similarly other pre-approved mitigation measures such as the installation of back-flow valves where none existed prior to the event, contradicts FEMA's current position. Clearly this is not an issue of "what cannot be done."

In recognition of the reviewer's comment that this project is a "good 404 candidate": we agree to some extent; however, in the context of the two programs, especially since 404 is competitive and more likely to fund the large amounts of buyouts and Pilot Reconstruction projects with a finite amount of funds, we, along with the State and initial FEMA experts determined that since these types of projects had been previously funded throughout the Country (thus eligible), that Section 406 was the appropriate source of funding.

We would also like FEMA to consider the proposed mitigation project in relationship to numerous federal requirements and obligations that stem from Executive Order (EO) 11988: **(BATES STAMP 00048)**

"Section 1. Each agency shall provide leadership and shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for ..."

(2) providing federally undertaken, financed, or assisted construction and improvements; and...

SEC. 2. In carrying out the activities described in Section 1 of this Order, each agency has a responsibility to evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget request reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of this Order, as follows:

If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in this Order requires sitting in a floodplain, the agency shall, prior to taking action, (i) design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order, and (ii) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain...

Agencies shall include adequate provision for the evaluation and consideration of flood hazards in the regulations and operating procedures for the licenses, permits, loan or grants-in-aid programs that they administer. Agencies shall also encourage and provide appropriate guidance to applicants to evaluate the effects of their proposals in floodplains prior to submitting applications for Federal licenses, permits, loans or grants...

While, arguably the above does not speak directly to the subject at hand; the intent is clear and unequivocally supports the project in question.

In addition to EO 11988, we would like FEMA to consider 44 CFR §9.11:

§9.11 Mitigation

(a) [t]he purpose of this section is to expand upon the directives set out in §9.6 of this part, and set out the mitigative actions required if the preliminary determination is made to carry out an action that affects or is in a floodplain or wetland.

(b)(1)[T]he agency shall design or modify its actions so as to **minimize harm** to or within the floodplain;

(2) The agency shall minimize the destruction, loss or degradation of wetlands;...

(c) Minimization provisions. The Agency shall minimize:

(1) potential harm to lives and investment at risk from the base flood or in the case of critical actions from 500-year flood.

Critical actions are defined (44 CFR §9.4) as "... an action for which even a slight chance of flooding is too great. The minimum floodplain of concern for critical actions is the 500-year floodplain, i.e., critical action floodplain. Critical actions include, but are not limited to, those which create or extend the useful life of structures or facilities:

(a)Such as those which produce, use or store highly volatile, flammable, explosive, toxic or water-reactive material."

It is important to consider that the EBWWTP uses and stores large quantities of hazardous and toxic chemicals.

The East Bank Sewage Treatment Plant (EBSTP) utilizes chlorine gas at this facility in sufficient quantities to warrant the submission of a Risk Management Plan (RMP) with the EPA. The practices of the operators of the EBSTP include provisions that address all aspects of the Accidental Release Prevention Program prescribed by EPA.

The S&WB is required (and is in compliance) with the requirements of Section 112 (r) of the 1990 Clean Air Act Amendments for the EBSTP to provide the EPA with hazardous assessment detailing the specific toxic chemicals and on site quantities. **(BATES STAMP 00081)**

Tier Two Hazardous Chemicals Inventory Report (Attached) Detailing the following:

- Two (2) 55 ton Chlorine rail cars stored on site (EHS Name Chlorine)
- One 350 gallon Sodium Hypochlorite 12.5% (EHS Name 12.5% Bleach)
- One 500 gallon Sodium Hypochlorite 12.5% (EHS Name 12.5% Bleach)
- 30,000 gallon Petroleum Diesel (EHS Name Diesel Fuel #2)
- 45,000 gallon Liquid Oxygen (EHS Name 12.5% Bleach)

The EPA requirements included the original creation of a Risk Management Plan (RMP) which was submitted by June 1999 to the United States Environmental Protection Agency (EPA) and a Spill Prevention Control Plan (SPCP). (Attached)

The required assessment of risks indicate that significant risks from toxic release of a plume of gas from accidental release of 11,000 pounds of chlorine per minute for 10 minutes will affect 726,185 people, 572 churches 36 hospitals 354 schools 3 Airports and 1 wildlife refuge.

Additionally, the release to the environment of untreated wastewater at the plant can be categorized as toxic and hazardous to the environment and is strongly condemned by the EPA. Raw sewage is known to carry biological bacteria agents and is considered to be a significant threat to the public and the environment.

In short, this entire system must be protected.

The first appeal analysis states "*...the Berm was not presented to FEMA for consideration...*" and "*...it has not been recognized or considered to be an eligible facility*". We are bothered by these assertions since the Berm meets all eligibility criteria (it is on the S&WB property; it was built by the S&WB during the construction of the facility in the early 1900's, and has been maintained every since). Furthermore, the FEMA Utility Team questioned the Berm's eligibility during the PW preparation. In response, the S&WB submitted Policy 9524.3 Policy for rehabilitation Assistance for Levees and Other Flood Control Works together with its associated "Flood Control Works; Eligibility for Federal Assistance in Presidentially Declared Disasters" chart dated March 1998 (attached), detailing "Other Water Control" (Non-Flood) and the related definition of "Non-flood" Control documents proving the Berm to be a FEMA eligible facility. We are confident that a thorough review of our FEMA generated Case Management File (CMF) will support the occurrence of all discussions and occurrences involving this project.

For further consideration, we would like to point out that while the appeal analysis relied on many references (some of which apply to Private Non-Profits), we feel that the prevailing reference (albeit presented in an unsupportive light) is indeed 44 CFR §206.201(c):

“Facility means any publicly or privately owned Building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature”.

Quite simply, the Berm is a critical component of the EBWWTP facility. Without the Berm it would be a swamp. The creation of the Berm (in the swamp) made the construction and continuous operation of the facility possible. Photos of the original **land reclamation** project were submitted with the first appeal if further proof is required. **(BATES STAMP 00083)**

Sought Resolution

As this Berm is in the best interest of the residents of the State of Louisiana, passes FEMA’s required Cost Benefit Analysis and addresses the required improvements under Executive Order 11988, we believe that the Berm project must be funded under FEMA’s Public Assistance Program in an expeditious manner. We are mindful that the proposed project does not fit neatly within a *pre-defined box* within Section 406; however, we strongly believe that the support for what we describe as *what FEMA can do* incontrovertibly outweighs the support for what FEMA says *it cannot do*.

The goal of mitigating future damages to the entire EBWWTP facility is being met with one project as opposed to numerous smaller projects. This project, similar to a floodwall surrounding a campus, or a retention pond (which did not exist prior to a disaster), is directly related to eligible disaster-related damages and directly reduces the potential of future damages. Even if current policy and statute did in fact prohibit this type of project from being funded through 406 (which we strongly feel they do not), FEMA is afforded the opportunity to grant an exception, as afforded by the very same policy being relied upon for the denial. We only ask you to exercise the same judgment and flexibility which policy allows, as you have in previous disasters. Lastly, we ask FEMA to agree, by design and intent, that this project meets the goals of both mitigation and floodplain management in the most elegant and cost-effective solution available.

The Sewerage & Water Board of New Orleans (S&WB) requests assistance of the arbitration Panel in facilitating the reversal of FEMA’s decision to disallow the funding of a vital Project Worksheet intended for the protection (Mitigation) of the East Bank Waste Water Treatment Plant in the City of New Orleans valued at 14 million dollars.

In closing, the Board is requesting to have a face-to-face hearing in response to this request. Please notify my office of the time date and location that this arbitrary hearing will be facilitated. The Board appreciates in advance the support of this arbitration process, and will be happy to provide any additional information required. If you have any questions or concerns regarding this correspondence, please contact me at (504)218-3235.

Civilian Board of Contract Appeals (CBCA)

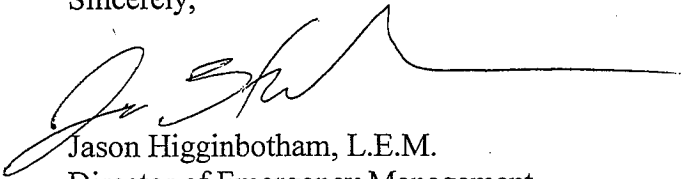
October 15, 2009

Page 8 of 8

As the Board's contact for this arbitration process please take note of my contact information as required:

Mr. Jason Higginbotham, LEM
625 St. Joseph Street
Room 117
New Orleans, La 70165
Office: 504 585 2015
Cell: 504-218-3235
Fax: 504-522-8721
Email: Jhigginbotham@swbno.org

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Higginbotham', followed by a long horizontal line extending to the right.

Jason Higginbotham, L.E.M.
Director of Emergency Management
& Applicant's Authorized Representative

Attachments

Backup Documentation Book

Area Photograph of EBWWTP days after Katrina

CC:

Gary Jones, Acting Regional Administrator

w/attachments

Mr. Mark Riley, Deputy Director Louisiana GOHSEP

w/attachments

